REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 160/2014

In the matter between:

RONALD ALBERT SLABBERT	**APPLICANT**
And	
THE LABOUR COMMISSIONER	**1ST RESPONDENT**
MATHEO RUDATH, N.O.	**2ND RESPONDENT**
NAMDEB DIAMOND CORPORTATION (PTY) LTD	**3RD RESPONDENT**
THE MINISTER OF LABOUR	**4TH RESPONDENT**

Neutral citation: *Slabbert v The Labour Commissioner* (LC 160/2014) [2016] NALCMD 4 (22 January 2016)

Coram: UNENGU AJ

Heard: **25 September 2015**

Delivered: **22 January 2016**

Flynote: Review application to review a decision by the arbitrator – Referral of dispute filed out of time – No provisions for condonation of late filing of referral of dispute in terms of s 86(2)*(a)* of the Labour Act 11 of 2007 – Application dismissed – Dispute had prescribed.

Summary: The applicant launched an application to review and set aside the refusal of the arbitrator to accept a dispute referral form filed after the prescribed period of six months within which to file such a referral in terms of s 86(2)*(a)* of the Labour Act 11of 2007 – Court dismissed the application as it has been filed outside

the prescribed time and there is no condonation for the late filing of the referral form in terms of section s 86(2)*(a)* of the Act.

ORDER

The application is dismissed.

JUDGMENT

UNENGU AJ:

[1] This is an application for review brought by the applicant in terms of s 89(A) of the Labour Act[1] (herein referred to as the Act), read with Rule 14 of the Labour Court Rules.

[2] The relief, the applicant seeks from the court is set out in the notice of motion which reads.

'**TAKE NOTICE** that **RONALD SLABBERT** (hereinafter called the applicant) intends to apply to this Court for the proceedings and/or decision set out below to be reviewed and for an order in the following terms-

1. Reviewing and setting aside the decision taken on 19 September 2014 by the First Respondent not to accept the referral of dispute dated 15 July 2014 and filed 17 July 2014 and not condone the non-compliance with Section 86 (2) (a) of the Labour Act, 2007 (Act 11 of 2007).

2. In the alternative to 1 above that it be declared that the First Respondent failed to exercise his judicial discretion in not accepting the condonation application, and

[1] Act 11 of 2007.

failed to act fairly and reasonably in terms of the common law and/or Article 12 and 18 of the Namibian Constitution.

3. In addition to 2 above, that it be (sic) declare that the First Respondent failed to apply the *Audi alterm partem rule* in terms of the common law and/or Article 12 and 18 of the Namibian Constitution.

4. Order that the First Respondent condone applicant's non-compliance with Section 86 (2) (a) of the Labour Act, 2007 (Act 11 of 2007) and that the matter be referred back for Arbitration to be heard de novo before a different arbitrator.

5. Confirm that the Arbitration proceedings, under arbitration number SROR 14-12, conducted by the Second Respondent on 02 July 2012 and the subsequent "Dismissal of the Arbitration" made by the Second Respondent on 22 July 2014 is null and void as there was non-compliance with Section 86(12) of Act 11 of 2007.

6. That in the event of this application being opposed, such opposing party be ordered to pay the costs of this application, jointly and severally, if applicable, only if the above Honourable Court deems it appropriate within the circumstances; and

7. Granting such further or alternative relief as this Honourable Court may deem appropriate.'

[3] The third respondent is opposing the review application on the grounds which will be discussed later in the judgment.

[4] The applicant was an employee of the third respondent who was dismissed from employment on 22 August 2012 after a disciplinary hearing conducted against him on misconduct charges of misappropriation, breach of trust, non-compliance with the employer's policies and breach of the code of ethics. Although the applicant was not happy with the result of the disciplinary hearing, he did not appeal the finding on any of the charges he was found guilty by the Disciplinary Review Committee of the Company. He referred a dispute to the Office of the Labour Commissioner on 11 December 2012, instead.

[5] The dispute was set down for conciliation and arbitration on 28 January 2013, but the applicant was not prepared to proceed and as result, he applied for the proceedings to be postponed so that he could prepare for the hearing. The postponement was refused. The applicant again not happy with the ruling of the arbitrator, he decided to stay away from the hearing. However, the arbitrator proceeded with the hearing in absence of the applicant and dismissed the dispute. On 22 February 2013 he received a fax by which he was informed that his complaint was dismissed.

[6] He took the decision to dismiss his complaint on review and the Labour Court on 4 October 2013 set aside the award and referred the complaint back to the Office of the Labour Commissioner with a direction that the arbitration be heard afresh on merits before a different arbitrator. On 2 July 2014 the second respondent dismissed the dispute due to the fact that LC 21 form did not comply with the Rules relating to conciliation and arbitration as the form was signed by a consultant who by law was not authorised to sign the LC 21 form.

[7] The applicant then approached De Beer Law Chambers legal practitioners who adviced him to lodge a fresh dispute to the Office of the Labour Commissioner – which he did on 17 July 2014. The decision of 2 July 2014 by the arbitrator, however, was not challenged, therefore still valid.

[8] In the written heads of argument, Ms Heydenreich, counsel for the applicant argues that the reason why the second respondent's dismissal of the dispute was not taken on review is because of the decision in the matter of *Agricultural Bank of Namibia v Simana*[2] by Hoff J delivered on 12 February 2014 where Hoff J, said that the referral in terms of Rule 5 must be signed by a party or person entitled to represent the party in the proceedings. According to her, as the labour consultant who signed the LC 21 on behalf of the applicant was excluded by the provisions of s 86(12) of the Act, coupled with the decision in the *Agribank* case, it was thought that the referral of the dispute for which Form LC 21 was signed by the labour consultant,

[2]LCA 32/2013 [2014] NALCMD 5.

was a nullity, therefore, arbitration proceedings following such a referral, likewise was a nullity and any award following therefrom is also a nullity.

[9] However, in her oral submission Ms Heydenreich conceded that the award was valid and that the applicant had the opportunity at that stage to have the decision reviewed. The only reason why the award was not taken on review, she said, is because they were unclear because of the judgments of Hoff J in *Agribank* supra and the judgment of Smuts J in *Purity Manganese (Pty) Ltd v Katjivena*[3].

[10] The reason why it was unclear to counsel, I cannot comprehend. The decision by Smuts J in the *Purity Manganese* was in their favour, therefore, could have afforded the applicant good authority to take the decision of the arbitrator on appeal or review but decided not to follow the decision, instead, launched another referral to the Office of the Labour Commissioner with regard the same dispute. This is the referral the arbitrator said it has been lodged out of time prescribed by the Labour Act, namely six months from the date of dismissal.

[11] Assuming that counsel is correct, that, because the LC 21 form which was signed by the labour consultant, who by law, was not allowed to sign the form, rendered the referral of the dispute and the arbitration flowing therefrom a nullity, still the time of six months prescribed by s 86(2)*(a)* of the Act, within which the applicant had to refer the dispute after his dismissal remained six months. And this six months period started running from the day the applicant was informed about the decision or finding of the arbitrator.

[12] Counsel, therefore, cannot be correct in her argument that because of the defect in the first referral, another referral to the Office of the Labour Commissioner could be made even outside the six months period stipulated in the Act.

[13] Ms Heydenreich also referred to *Purity Manganese (Pty) Ltd v Katjivena and Auto Exec CC v Johan van Wyk*[4] in which cases it was said, amongst others that, the

[3]LC 86/2012 [2014] NALCMD 10.
[4]LC 150/2013 [2014] NALCMD 16 (16 April 2014).

rule given had not intended that the proceedings will not result in a nullity where the referral form had not been signed and when the parties had participated in the proceedings – because the participation of the litigants in the proceedings amounted to ratification of the unsigned form.

[14] I find nothing wrong with the view expressed in the abovementioned cases. Once a litigant to a dispute has taken a decision, that litigant also accepts the consequences which may or might flow from the selection made provided it was made without undue influence.

[15] Having said that, the facts of the present matter is distinguishable from the facts of the cases referred to above, in my opinion. Unsigned referral forms were the subject matters in the cases referred to above whereas in the present matter, the issue is the time within which to refer a dispute for resolution to the Office of the Labour Commissioner.

[16] Referral forms are regulated by the Rules of the Labour Court and Regulations dealing with Conciliations and Arbitration – therefore any non-compliance therewith, may be condoned by the court on application and on good cause shown[5], at any time of the proceedings. However, the same is not with regard the failure to comply with the provisions of s 86(2), which reads as follows:

> '(2) A party may refer a dispute in terms of subsection (1) only –
>
> (a) within six months after the date of the dismissal, if the dispute concerns a dismissal, or
>
> (b) within one year after the dispute arising, in any other case.'

[17] In the review application at hand, the dispute concerns a dismissal, therefore, the provisions of subsection (2)*(a)* is applicable. Rule 15 grants the Labour Court a discretion to condone a non-compliance with any rule – on application and on notice to all interested parties explaining the reason(s) for the default in an affidavit. No such a provision is in the Labour Act authorising the court or a tribunal to condone

[5]Rule 15 of the Labour Act.

the non-compliance with the section or to extent the six months period after the date of dismissal within which a dispute of such dismissal may be referred for conciliation and arbitration.

[18] The applicant did comply with the provisions of s 86(2)*(a)* initially but the second referral was done after the expiration of six months rendering the referral of the dispute to the Labour Commissioner out of time and as a result had prescribed in terms of s 86(2)*(a)*. (See *Nedbank Ltd v Louw* (LC 68/2010) delivered on 30 November 2010 at para 10; *Namibia Development Corporation v Mwandingi and Others* 2013 (3) NR 737 (LC) para 34).

[19] As indicated above that no condonation is provided for the late referral of the dispute to the Labour Commissioner in terms of s 86(2) while in s 89(3) condonation for the late filing of an appeal can be granted by the Labour Court. If it was the intention of the legislative body to make a provision for the late filling of a referral to the Labour Commissioner with regard the dismissal, it could have expressly stated so in the Act but left it out probably for a good reason which is for speedy resolutions of disputes concerning dismissals. This is clear from the provisions of subsection (2) *(a)* and (*b).*

[20] It is clear from the evidence on record and from both written heads and the oral submissions by counsel for the applicant that his legal practitioners did not advise him and handled his case properly. This include the service he got from the labour consultant. They are the architects of his rue, in my view. In her oral submissions, Ms Heydenreich, amongst others, submitted that due to the fact that was at that stage, that two different cases dealt with form LC 21, it was, (according to her) confusing for the applicant, and as such was advised to go with the *Agribank* case to refile the dispute on a new LC 21 form with a condonation application.

[21] It shows clearly that counsel was only concerned with the referral form (LC 21) not with the time within which the dispute self should be referred to the Labour Commissioner. She conceded that the applicant had an opportunity to review the

decision made by the arbitrator by the Labour Court but did not make use of that opportunity.

[22] It is also not clear why the legal practitioner who advised the applicant not to appeal or to review the decision of the arbitrator did not seek assistance from an experienced legal practitioner (advocate), who could have advised both the applicant and his legal practitioner of record on the correct course to follow. This, the legal practitioner did not do and instead elected to advise the applicant wrongly by launching the second referral of the dispute to Labour Commissioner out of time. The legal practitioner is the representative whom the applicant has chosen for himself, therefore, the applicant will have to stomach the consequences of their relationship irrespective the circumstances or natures of the failures are[6].

[23] In the meantime, it is the contention of Mr Dicks, counsel for the respondent that the claim or dispute of the applicant has prescribed, no matter the excuse the applicant has to offer. He submitted that condonation for the non-compliance with the section providing for the time of six months, is out of question. He pointed out the difference between the provisions in the Labour Act of 1992 and the current Labour Act 11 of 2007. Whereas in the 1992 Labour Act, the period of 12 months could have been extended by the court on good cause shown – that provision was omitted in the 2007 Labour Act. According to Mr Dicks, what is relevant is the date of 11 August 2012 when the cause of action arose, and 2 July 2014 when the dispute was dismissed. What happened between these two dates are not worth considering, he further argued. I think he is correct and I tend to agree with him. I agree again and accept Mr Dick's submission that the applicant looked at one decision by Hoff J and ignored other decisions of this court which cases[7] could have assisted them in making a correct choice.

[24] In addition, Mr Dicks argued that s 117 of the Labour Act cannot be of assistance to the applicant's case as it is not wide enough to permit the Labour

---

[6]Swanepoel v Marais and Others 1992 NR 1 at 3E-F.
[7]Purity Manganese (footnote 3 above), Nedbank Ltd v Louw
and the Mwandingi case cited in para 17

Commissioner or the court to ignore the existing law. Further, it is his submission that the arbitrator was correct not to accept the dispute of 15 July 2014 referred to the Labour Commissioner – filed on 17 July 2014 as such referral was out of time, that the arbitrator did not have the power to condone the non-compliance with s 86(2) and had no judicial discretion to exercise.

[25] The gist of Mr Dick's submissions, if I understood him correctly, is, that the arbitrator did nothing wrong by refusing to accept the second referral of the dispute because the dispute had prescribed, therefore, the applicant had no case to refer to the Labour Commissioner for conciliation and arbitration. The submissions are not without substance in my view. That being the case, and as already said, I am not satisfied that the applicant had managed to prove on a balance of probabilities that an irregularity or any misdirection was committed by the arbitrator for the proceedings or the decision taken on 15 July 2014 to be reviewed and set aside, on any of the grounds set out in the notice of motion.

[26] I agree with and accept the arguments by Mr Dicks and reject those of Ms Heydenreich as unconvincing – which arguments are tainted with unsubstantiated allegations in an attempt to justify the wrong advice given to the applicant, namely to file another dispute referral at the time when the dispute had already prescribed.

[27] There are other prayers made by counsel for the applicant during oral submissions, which I have taken note of but in view of the conclusion I have come to in the matter, I do not think it is necessary to comment on them.

[28] In the result, the following order is made:

The application is dismissed.

10
10
10
10
10

E P UNENGU

Acting Judge

APPEARANCES

APPLICANT :	A Heydenreich of De Beer Law Chambers, Windhoek
3RD RESPONDENT:	G Dicks Instructed by Köpplinger Boltman, Windhoek